No. 22-50748

In the United States Court of Appeals for the Fifth Circuit

JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING; BRENDA LI GARCIA,
Plaintiffs-Appellants

v.

JANE NELSON, TEXAS SECRETARY OF STATE,
Defendant-Appellee

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

BRIEF FOR APPELLEE

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Certificate of Interested Persons

No. 22-50748

Joseph Daniel Cascino; Shanda Marie Sansing; Brenda Li Garcia,

Plaintiffs-Appellants

v.

Jane Nelson, Texas Secretary of State,

Defendant-Appellee

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellee, as a governmental party, need not furnish a certificate of interested persons.

/s/ Michael R. Abrams
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Statement Regarding Oral Argument

This Court's opinion in *Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020) (*TDP II*), forecloses plaintiffs' claim that section 82.003 of the Texas Election Code facially violates the Twenty-Sixth Amendment. Because that is the only issue that plaintiffs press on appeal, oral argument is unlikely to aid the Court in its decisional process. If the Court concludes that oral argument is warranted, however, appellee respectfully reserves her right to participate.

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INTRODUCTION

Plaintiffs initiated this case at the outset of the pandemic. In a sprawling complaint with an amalgamation of statutory and constitutional theories, plaintiffs alleged that Texas officials were failing to ensure that voters could safely exercise the franchise. Notwithstanding ample record evidence to the contrary, the district court agreed. Just weeks before an election, the court entered "a sweeping preliminary injunction that require[d]" Texas's Governor, Attorney General, Secretary of State, and a large swath of "state officials" allegedly acting in concert with them "to distribute mail-in ballots to any eligible voter" who wanted one. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020) (*TDP I*). This Court quickly stayed, and ultimately vacated, that injunction. *Id.* at 412; *TDP II*, 978 F.3d at 194.

Although the district court's injunction rested on multiple grounds, plaintiffs defended it on only one: that the Twenty-Sixth Amendment prohibits allowing *only* voters who are at least 65 years old to vote by mail without excuse. *TDP II*, 978 F.3d at 194. The Court dismissed those claims against the Governor and Attorney General for lack of jurisdiction. *Id.* at 180-81. As to the Secretary, "[t]his claim fails" on the merits, the Court held, "because conferring a benefit on another class of voters does not deny or abridge the plaintiffs' Twenty-Sixth Amendment right to vote." *Id.* The Court's bottom-line holding was so pellucid that in seeking certiorari (which the Supreme Court later denied, with no noted dissents), plaintiffs described *TDP II* as a "categorical" resolution of their Twenty-Sixth Amendment claim.

On remand from the preliminary injunction proceedings, plaintiffs asserted a dizzying array of claims. This time, the district court dismissed them. Again,

plaintiffs' opening brief proffers only one theory: an assertion that section 82.003 violates the Twenty-Sixth Amendment. As they must, plaintiffs acknowledge that this Court's decision in *TDP II* addressed this precise issue. Nonetheless, they profess uncertainty about how the panel's decision applies under the Circuit's rule of orderliness and law-of-the-case doctrine.

There is no basis for plaintiffs' asserted belief that the Twenty-Sixth Amendment issue remains open. All published decisions of this Court are binding precedent, including those arising from orders on preliminary injunctions. *Royal Ins. Co. of Am. v. Quinn-L Cap. Corp.*, 3 F.3d 877, 881 (5th Cir. 1993). The law that the Court has already established—including its unequivocal pronouncement that section 82.003 comports with the Twenty-Sixth Amendment—applies with full force here. And even if the Court's discussion was just dicta, plaintiffs' claim would still fail as a matter of law for the reasons *TDP II* comprehensively laid out.

The district court's judgment faithfully applying that reasoning should be affirmed.

Statement of Jurisdiction

Plaintiffs brought a host of federal claims, thereby invoking the federal courts' jurisdiction under 28 U.S.C. § 1331. ROA.2472, 2487. Plaintiffs timely appealed from the district court's opinion and final judgment rejecting each of those claims. ROA.2772-2804, 2805-06, 2807. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Issue Presented

Did the district court correctly dismiss plaintiffs' Twenty-Sixth Amendment challenge to section 82.003 of the Election Code?

Statement of the Case

I. Statutory Background

For more than a century, Texas law has required most voters to cast their ballots in person, either on election day, Tex. Elec. Code ch. 64, or during an early-voting period prescribed by the Legislature, *id.* § 82.005. The only exceptions are for voters who face unique hardships in going to the polls. In 1917, the Legislature passed the first absentee voting law to allow qualified voters who expected to be away from their counties on election day to vote. Act of May 26, 1917, 35 Leg., 1st C.S., ch. 40, 1917 Tex. Gen. Laws 62. In 1935, the Legislature extended absentee voting to the ill and physically disabled. Act of October 30, 1935, 44th Leg., 2nd C.S. ch. 437, § 1, 1935 Tex. Gen. Laws 1700, 1700-01.

In the 1970s, the Texas Election Code underwent significant retooling. One impetus for that legislative overhaul was the passage of the Twenty-Sixth Amendment. Ratified in 1971, it provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI § 1. Four years after the Amendment's ratification, the Texas Legislature "extended absentee voting to voters 65 years of age or older." *In re State of Texas*, 602 S.W.3d 549, 558 (Tex. 2020) (citing Act of May 30, 1975, 64th Leg., R.S., ch. 682, § 5, 1975 Tex. Gen. Laws 2080, 2082). And by overwhelming majority, the Legislature lowered the voting age

to 18. *See* H.J. of Tex., 64th Leg., R.S. 4204 (1975); S.J. of Tex. 64th Leg., R.S. 2536 (1975). These changes collectively reflected the Legislature's intent "to bring the Texas Election Code into conformity with" the Twenty-Sixth Amendment.[1]

Texas currently allows voters to vote by mail if they (1) anticipate being absent from their county of residence, Tex. Elec. Code § 82.001; (2) are sick or disabled; *id.* § 82.002; (3) are 65 or older, *id.* § 82.003; or (4) are confined in jail, *id.* § 82.004. In response to a state court suit brought by many of the same plaintiffs who sued state officials in this case,[2] the Texas Supreme Court considered the scope of section 82.002, which allows individuals to vote by mail if they have "a sickness or physical condition" that prevents them "from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." *Id.* § 82.002(a)(1). The Court rejected plaintiffs' expansive reading of section 82.002 and held that "a lack of immunity to COVID-19 is not itself a 'physical condition' for being eligible to vote by mail." *In re State of Texas*, 602 S.W.3d at 560.

[1] House Comm. on Elections, Bill Analysis, Tex. S.B. 1047, 64th Leg., R.S. (1975), https://tinyurl.com/mpjm3ukn.

[2] *See* Pls.' Original Pet. & Appl. for Temporary Inj., Permanent Inj. & Declaratory J., *Tex. Democratic Party et al. v. Hughs*, No. D-1-GN-20-001610 (201st District Ct., Travis County, Tex. Mar. 20, 2020) (seeking a declaratory judgment that section 82.002 of the Election Code "allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease").

II. Procedural Background

A. The district court's preliminary injunction, this Court's vacatur and reversal, and the Supreme Court's denial of certiorari

This lawsuit served as a hedge against an unfavorable outcome in the state court proceedings. In April 2020, the Texas Democratic Party, Gilberto Hinojosa, Chair of the Texas Democratic Party, and three voters under 65, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia filed suit in the Western District of Texas. ROA.28. Soon afterward, they sought a preliminary injunction that would require Texas officials to allow all voters to vote by mail. ROA.108-43 (preliminary injunction motion); ROA.388 (proposed order that the State "may not deny a mail in ballot to any Texas voter that applies for a mail-in ballot because of the risk of transmission of COVID-19").Their motion rested on several independent theories, but their primary argument was that section 82.003 cannot be squared with the plain text of the Twenty-Sixth Amendment. *See* ROA.121-27.

As to that issue, the district court applied strict scrutiny and concluded that section 82.003 "is a government classification based on age and discriminates against voters under the age of 65 based on age," and thus section 82.003 "is prima facie discriminatory under all circumstances." ROA.2121. In its order granting a preliminary injunction on that and other bases, the court ordered that "[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances." ROA.2075.

The defendant state officials, including the Secretary of State, immediately appealed.[3] ROA.2140. A motions panel of this Court unanimously stayed the injunction. *TDP I*, 961 F.3d at 412. The motions panel concluded that the State was likely to show a substantial likelihood of success on the merits, reasoning that "there is no evidence that *Texas* has denied or abridged" the right to vote under the Twenty-Sixth Amendment. *Id.* at 409. Plaintiffs then asked the Supreme Court to vacate the stay and grant certiorari before judgment. The Court denied those requests with no noted dissents. *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020).

Before the merits panel, plaintiffs defended the preliminary injunction "only on Twenty-Sixth Amendment grounds." *TDP II*, 978 F.3d at 176. They asserted that "it is not the State's tragic inability to contain the COVID-19 epidemic that compels affirmance of the District Court's order—it is the Twenty-Sixth Amendment's unambiguous text that does." *Id.* at 177. Though its exact reasoning differed from the stay panel, the panel majority agreed that section 82.003 does not transgress the Twenty-Sixth Amendment and vacated the injunction. *Id.* at 184-94. The Court found that plaintiffs failed to meet their burden to show that their right to vote—if implicated—had been "abridged" within the meaning of the Twenty-Sixth Amendment because section 82.003 does not "create[] a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the *status quo*." *Id.* at 192. And although the merits panel noted that it was not ultimately deciding

[3] Plaintiffs also named the Governor, the Attorney General, and officials from Travis and Bexar Counties as defendants. ROA.99. On remand, plaintiffs dropped the Governor and the Attorney General. ROA.2474, 2487.

plaintiffs' facial challenge to section 82.003 under the Twenty-Sixth Amendment, the panel emphasized that its "analysis does not turn on the effect of the pandemic" and that it "is impossible to consider the as-applied challenge based on the pandemic without addressing what is generally required to violate the Twenty-Sixth Amendment." *Id.* at 182.

Plaintiffs renewed their efforts to obtain a writ of certiorari. The Supreme Court typically declines to grant review of cases in an interlocutory posture, *see, e.g.*, *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari), but plaintiffs asserted that there "is nothing more to do on remand" in light of the panel's "holding that Section 82.003's age-based restriction of no-excuse vote by mail is consistent with the [Twenty-Sixth] Amendment." Petr.'s Reply at 5, *Tex. Democratic Party v. Abbott*, 141 S. Ct. 1124 (2021) (No. 19-1389). To emphasize the need for—and appropriateness of—immediate review, they represented that the panel "categorical[ly]" held that "by definition no denial or abridgment has occurred." *Id.*

The Supreme Court denied certiorari—again without noted dissent. *Tex. Democratic Party v. Abbott*, 141 S. Ct. 1124 (2021).

B. Plaintiffs' amended complaints and the district court's dismissal order

Meanwhile, after *TDP I*, the district court issued a stay order "pending the conclusion of the appellate proceedings related to the preliminary injunction order." ROA.2312. Once the Supreme Court denied certiorari, plaintiffs filed an amended complaint, ROA.2463-80, as did the League of United Latin American Citizens and

the Texas League of United American Citizens, who intervened as plaintiffs, ROA.2481-2500. Collectively, the new complaints contended that Texas's age-based eligibility requirement for voting by mail: 1) discriminates on the basis of age in violation of the Twenty-Sixth Amendment; 2) has a discriminatory effect on Latino voters; 3) imposes an undue burden on their right to vote; and 4) denies them equal protection of the law as compared to voters over the age of 65. ROA.2474-78, 2493-97. They complained of "recent and likely to come, enacted and enforced state election policies" and "other pandemic related policies" that were allegedly "effective at diminishing minority voter turnout." ROA.2464, 2470.

The Secretary moved to dismiss both complaints on jurisdictional and merits grounds.[4] ROA.2564-75, 2576-91. Due to the plaintiffs' choice to challenge statutes "likely to come" and their focus on the pandemic in their statement of facts, she noted that plaintiffs lacked standing to attack laws that (at that time) had not yet been enacted and pandemic conditions that (still) have not yet materialized. ROA.2567. On the merits, she maintained that the Court's conclusion that "conferring a benefit on another class of voters does not deny or abridge the plaintiffs' Twenty-Sixth Amendment right to vote" compelled dismissal of plaintiffs' Twenty-Sixth

[4] When this suit was first filed, Ruth Hughs served as the Secretary of State. ROA.99. The amended complaint names her as a defendant along with two local officials. ROA.2463. The district court substituted her successor, John B. Scott, ROA.2772, and the appeal has been prosecuted only as to him. Appellants' Br. i. Earlier this month, Jane Nelson assumed the office. Because plaintiffs have abandoned any argument against the remaining defendants, *infra* Part I, this brief treats Secretary Nelson as the only appellee.

Amendment claim. ROA.2569 (citing *TDP II*, 978 F.3d at 194). Likewise, the Secretary contended that plaintiffs failed to plead viable claims under their other theories for relief. ROA.2569-74.

The district court dismissed plaintiffs' claims. ROA.2805. The court did not dismiss the complaint in toto based on either standing or sovereign immunity. *Contra* Appellants' Br. Part I. Instead, it agreed that plaintiffs lacked standing to challenge section 82.003 "*when combined with* future pandemic conditions and 'proposed bills,' and unenacted 'election policies' and future pandemic conditions." ROA.2779. With respect to plaintiffs' claims based on *current* and enrolled bills, the court agreed with the Secretary that plaintiffs did not state a claim because they "did not sufficiently allege any violation of their rights under the First, Fourteenth, Fifteenth, or Twenty-Sixth Amendments when considered individually." ROA.2798. In particular, the court found that "[t]he Fifth Circuit's opinion in this case forecloses plaintiffs' Twenty-Sixth Amendment claim" because the "Court announced the standard for adjudicating claims under the Twenty-Sixth Amendment" and "held that plaintiffs' claim failed as a matter of law." ROA.2781. Secondarily, the court noted that "the 'law of the case' rule forecloses relitigation of this issue." ROA.2782 (citing *United States v. Lee*, 385 F.3d 315, 321 (5th Cir. 2004)).

Only three plaintiffs—Cascino, Sansing, and Garcia—timely appealed. ROA.2807. The sole claim on which they urge reversal is their facial Twenty-Sixth Amendment challenge to section 82.003. Cascino Br. 16.

Summary of the Argument

I. In this, the second time this case is before a merits panel of this Court, plaintiffs have again chosen to challenge the constitutionality of Texas's mail-in ballot rules under the Twenty-Sixth Amendment. All other challenges and all claims against any defendant other than the Secretary should be deemed abandoned.

II. Two related principles bar re-litigation of the issues that the Court addressed (and settled) in *TDP II*, including *both* the merits of plaintiffs' Twenty-Sixth Amendment claim and the jurisdictional issues to which plaintiffs devote a significant portion of their brief. *First*, under this Circuit's rule of orderliness, one panel of the Court may not overturn another panel's decision. This rule "is strict and rigidly applied." *In re Bonvillian Marine Serv., Inc.*, 19 F.4th 787, 792 (5th Cir. 2021). In *TDP II*, the Court held that section 82.003 does not run afoul of the Twenty-Sixth Amendment because "conferring a benefit on another class of voters does not deny or abridge" other individuals' right to vote. 978 F.3d at 194. Application of the rule of orderliness leaves no room for the Court to depart from its categorical holding that section 82.003 is harmonious with the Twenty-Sixth Amendment (or its ruling that there is jurisdiction to pursue that claim against the Secretary).

Second, the law-of-the-case doctrine applies here, and it "dictates that a prior decision of this court will be followed without re-examination, both on the remand to the district court and on subsequent appeals." *N. Miss. Comm'ns, Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir. 1992). Plaintiffs invoke a narrow exception to the doctrine for "clearly erroneous" decisions that would work a "manifest injustice," but they failed to raise that argument below, and it is therefore waived. In any event, the

Court's thoughtful analysis in *TDP II* was not clearly erroneous (let alone a manifest injustice). It addressed issues that even plaintiffs recognized were "novel." Not a single justice dissented from the Supreme Court's denial of certiorari. And the Court's holding was consistent with the only other circuit court to have since considered the issue. *See Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020). It is hard to see how the Court's decision could have been clearly erroneous under those circumstances, and plaintiffs barely bother trying to show otherwise. That is doubly so because, if this Court were *not* bound by *TDP II*, this Court's subsequent cases would require the claim against the Secretary to be dismissed on the ground of sovereign immunity.

III. Even if the Court could write on a clean slate, the district court's judgment should still be affirmed (if the case is not otherwise entirely dismissed). The *TDP II* panel correctly concluded that section 82.003 bestows a legislative grace on voters over 65, and that it does not, in so doing, infringe on the voting rights of individuals under 65. Because section 82.003 does not target a suspect class or infringe on the "right to vote" as that term was understood when the Twenty-Sixth Amendment was ratified, rational basis review applies.

The State has a significant, well-established interest in ensuring that voting in Texas is primarily conducted in person and that voting by mail is a limited option reserved for those voters who most need to utilize it. That judgment call is entitled to substantial deference, and plaintiffs have not come close to overcoming it.

Standard of Review

Like other causes of action, claims attacking election laws are subject to dismissal under Federal Rule of Civil Procedure 12(b)(6) if those claims are not viable under controlling precedent. *E.g.*, *LULAC v. Abbott*, 951 F.3d 311, 314 (5th Cir. 2020). The Court reviews de novo a district court's dismissal for failure to state a claim, accepting a plaintiff's well-pleaded factual allegations in the complaint as true. *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 899 (5th Cir. 2019).

The Court need not accept the plaintiff's legal conclusions as true, and threadbare recitals of the elements of a cause of action and conclusory statements are insufficient to state a claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff's claims "may be dismissed under Rule 12(b)(6) on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319 (1989). In addition, the Court may affirm the district court's dismissal on any basis supported by the record. *Inclusive Cmtys. Project, Inc.*, 920 F.3d at 899.

Argument

I. Any Claims Not Addressed in the Opening Brief Are Abandoned.

Twice, plaintiffs have chosen to assert a single claim to this Court: that the Twenty-Sixth Amendment prohibits the State from distinguishing based on age in affording access to mail-in ballots. The last time the case was here, the Court concluded that because plaintiffs were appellees, they did not abandon their remaining claims—for example, those under the First and Fifteenth Amendments—by simply declining to discuss them. *TDP II*, 978 F.3d at 177-78. Now that they are appellants, their second failure to address the questions "intentionally waive[s] or inadvertently

forfeit[s] the right to present an argument by failure to press it on appeal." *Id.* at 177 (citing *Nichols v. Enterasys Networks Inc.*, 495 F.3d 185, 190 (5th Cir. 2007)); *see also Moore v. LaSalle Mgmt. Co., L.L.C.*, 41 F.4th 493, 501 n.2 (5th Cir. 2022). This includes any claims against the two local officials named as defendants in the amended complaint. ROA.2463. It also includes any remaining theories implicating the Secretary.

II. As to Plaintiffs' Twenty-Sixth Amendment Claim, *TDP II* Is Binding Precedent.

As to the Twenty-Sixth Amendment, Plaintiffs have clarified (at 14) that they "do not ask the Court to consider potential future legislation or evaluate the potential impact of the pandemic in future elections." Instead, they "only ask that the Court analyze Texas' current age-based restriction on absentee voting which implicates the Twenty-Sixth Amendment." Cascino Br. 14. So stated, the Secretary agrees with plaintiffs (at 13-14), that the claim is ripe and that *TDP II* establishes plaintiffs have standing to bring this claim and that it is not barred by the Secretary's sovereign immunity. 978 F.3d at 179-80.

Nevertheless, the district court was right that *TDP II* "forecloses plaintiffs' Twenty-Sixth Amendment claim." ROA.2781. And even if plaintiffs were correct that this Court's rule of orderliness does not doom their claim altogether, they would face a different problem: under this Court's most recent precedent postdating *TDP II*, their claim should be dismissed under principles of sovereign immunity.

A. The Court is bound by the rule of orderliness.

Under the rule of orderliness, "one panel of [the] court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, [] the Supreme Court," or the Court sitting en banc. *Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). This rule means "simply that [the Court is] to apply stare decisis in determining whether an earlier panel opinion is controlling." *United States v. Castillo-Rivera*, 853 F.3d 218, 227 (5th Cir. 2017) (en banc) (Higginbotham, J., concurring).

"[E]very published opinion is precedent that binds future Fifth Circuit panels" and district judges. *Sambrano v. United Airlines, Inc.*, 45 F.4th 877, 887 (Smith, J., dissenting from the denial of the petition for rehearing en banc). This includes cases arising from the grant or denial of a preliminary injunction. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 876 F.3d 699, 702 (5th Cir. 2017) (per curiam) (Elrod, J., dissenting from the denial of rehearing en banc) ("The fact that this case is still at the preliminary injunction stage does not excuse our decision to deny en banc rehearing. The panel majority opinion is binding precedent that will guide the development of the law in our circuit."); *see also, e.g.*, *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007) ("Any of our conclusions [at the preliminary injunction phase] on pure issues of law . . . are binding.").

These notions are so deeply entrenched in the Court's operations that plaintiffs can muster only one quibble with the rule of orderliness's application here: they submit that "where the preliminary injunction review panel disclaimed ruling on the

facial challenge presented in this appeal, it is unclear how this rule operates." Cascino Br. 9 n.2. This assertion introduces an unnecessary layer of confusion by mischaracterizing the *TDP II* panel's reasoning and the differences between facial and as-applied claims.

A facial challenge "is really just a claim that the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019). Classifying a lawsuit as facial or as-applied "does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Id.* "Surely it would be strange for the same words of the Constitution to bear entirely different meanings depending only on how broad a remedy the plaintiff chooses to seek." *Id.* at 1127-28. As a result, the line between facial and as-applied challenges can sometimes prove "amorphous." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 15 (2012). That being said, a conclusion that a statute can be constitutionally applied in specified circumstances is, at best, in significant tension with the notion that the statue is facially unconstitutional (and thus can never be applied).

The *TDP II* panel understood these precepts and grappled with their nuances. The panel took pains to note that its analysis "does not turn on the effect of the pandemic." 978 F.3d at 182. It cautioned that it "is impossible to consider the as-applied challenge based on the pandemic without addressing what is generally required to violate the Twenty-Sixth Amendment." *Id.* And it caveated that the difference between facial and as-applied challenges "is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Id.* (quoting *Citizens United v. Fed.*

Election Comm'n, 558 U.S. 310, 331 (2010)). The panel then applied a "substantive rule of law," *Precythe*, 139 S. Ct. at 1127, when it determined that "the Texas Legislature's conferring a privilege to those at least age 65 to vote absentee did not deny or abridge younger voters' rights who were not extended the same privilege." *TDP II*, 978 F.3d at 192. That determination did not turn on the facts of the pandemic and is not limited to any particular voter under 65; it applies universally to everyone who is ineligible to vote by mail under section 82.003.

In an earlier phase of the case, plaintiffs admitted that the panel majority's holding is "categorical" and that there is "no factual evidence relevant to determining whether Section 82.003 violates the Twenty-Sixth Amendment." Pet.'s Reply Br. 5, *Tex. Democratic Party v. Abbott*, 141 S. Ct. 1124 (2021) (No. 19-1389), 2020 WL 7681469. That admission hinders plaintiffs' attempt to create an end-run around *TDP II*, because "concrete facts" are what "properly underlie an as-applied challenge to a statute." *Justice v. Hosemann*, 771 F.3d 285, 295 (5th Cir. 2014). The *TDP II* panel did not consider any "concrete facts" when it resolved plaintiffs' Twenty-Sixth Amendment claim: it addressed "what is generally required to violate the Twenty-Sixth Amendment." 978 F.3d at 182. The Court's reasoning in *TDP II*, and its subsequent holding, are thus binding precedent even to the extent plaintiffs bring a new facial challenge here that the Court did not previously consider. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (under stare decisis, courts are bound "not only [by] the result" of past decisions but also by "those portions of the opinion necessary to that result"). After all, "[t]he rule of orderliness applies as equally to a panel's implicit reasoning as it does to its express holdings." *Newman v. Plains All*

Am. Pipeline, L.P., 23 F.4th 393, 400 (5th Cir. 2022) (citing *Arnold v. U.S. Dep't of Interior*, 213 F.3d 193, 196 n.4 (5th Cir. 2000)); *see also, e.g.*, *Dickie Brennan & Co., L.L.C. v. Zurich Am. Ins. Co.*, No. 21-30776, 2022 WL 3031308, at *2 (5th Cir. Aug. 1, 2022).

B. The Court is bound by the law-of-the-case doctrine.

The district court was also right that "the 'law of the case' rule forecloses relitigation" of plaintiffs' Twenty-Sixth Amendment claim. ROA.2782. Even in the absence of a published precedential opinion binding on all parties within a circuit, "[t]he law of the case doctrine posits that ordinarily an issue of fact or law decided on appeal" between *these* parties "may not be reexamined either by the district court on remand or by the appellate court on subsequent appeal." *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004). "As to decisions of law, the interlocutory appeal will establish law of the case." *Quinn-L Capital Corp.*, 3 F.3d at 881; *see also Gaalla v. Brown*, 460 F. App'x 469, 476 (5th Cir. 2012) ("[C]onclusions of law made by a court of appeals regarding a preliminary injunction become the law of the case, and binding on that court in further proceedings.").

This Court has recognized three narrow exceptions to the doctrine that "permit a court to depart from a ruling made in a prior appeal" in the same case: (1) if the "evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice." *Lee*, 358 F.3d at 320 n.3 (citation omitted). Even if those conditions are disjunctive rather than conjunctive—and it is

not clear that they are[5]—plaintiffs cannot meet any of them. As to the first two, plaintiffs do not attempt to show new evidence that was introduced post-remand (because there was none) or an intervening change in the law (because the only case to address the issue at the circuit-court level agreed with *TDP II*, *see Tully*, 977 F.3d at 614). They complain instead (at 9) that the Court's prior decision was clearly erroneous and would constitute a manifest injustice.

There are at least four fatal flaws with that argument. *First*, plaintiffs never made it below, and it is therefore waived. *See Celanese Corp. v. Martin K. Eby Constr. Co.*, 620 F.3d 529, 531 (5th Cir. 2010). *Second*, *TDP II* was not clearly erroneous under this Circuit's "very exacting standard." *Hopwood v. State of Texas*, 236 F.3d 256, 272 (5th Cir. 2000). "Mere doubts or disagreement about the wisdom of a prior decision of this or a lower court will not suffice for this exception." *Id.* As the Court memorably put it, to be clearly erroneous, a decision must be "more than just maybe or probably wrong; it must be dead wrong." *Id.*

Far from being "dead wrong," the Court's analysis of the Twenty-Sixth Amendment and section 82.003 is historically and legally sound. *See infra* Part II. And any error, to the extent there even is one, is hardly obvious. The panel was tasked with addressing "seemingly novel questions regarding the Twenty-Sixth Amendment." *Tex. Democratic Party*, 140 S. Ct. at 2015 (Sotomayor, J., respecting the denial of application to vacate stay). Counsel for plaintiffs have acknowledged

[5] *Compare Lee*, 358 F.3d at 320 (framing the elements conjunctively), *with United States v. Becerra*, 155 F.3d 740, 752-53 (5th Cir. 1998) (disjunctively).

elsewhere that this is a "first-of-its kind lawsuit to compel the [S]tate to provide its voters with relatively unrestricted vote-by-mail."[6] Moreover, *TDP II* is consistent with a later decision from the Seventh Circuit, which considered an absentee voting statute identical to Texas's, reasoned that the statute implicated "not a claimed right to vote but a claimed right to an absentee ballot," and held that the Twenty-Sixth Amendment protects only the former (the right to vote) and not the latter (the right to an absentee ballot). *Tully*, 977 F.3d at 614 (cleaned up). The Supreme Court denied certiorari in that appeal, too. 141 S. Ct. 2798 (2021) (mem. op.). All of this signals that this Court's determination of plaintiffs' "first-of-its-kind" Twenty-Sixth Amendment claim was not erroneous, let alone clearly so.

Third, maintenance of the status quo—the ongoing application of section 82.003 in the State's electoral process as it has applied for nearly half a century—does not work a manifest injustice. Judges lack a "roving commission to rewrite state election codes," *TDP I*, 961 F.3d at 394, and "[n]o court has ever held that a voter has a right to cast a ballot by the method of his choice," *Veasey v. Abbott*, 830 F.3d 216, 307 (5th Cir. 2016) (en banc) (Jones, J., concurring in part and dissenting in part). Texas law offers voters an array of options to exercise the franchise, *see, e.g.*, Tex. Elec. Code § 85.001(a) (period for early voting begins on the 17th day before election day and continues through the 4th day before election day), and plaintiffs have not alleged

[6] Chad W. Dunn, et al., *Legal Theories to Compel Vote-by-Mail in Federal Court*, 11 Cal. L. Rev. Online 166, 167 (2020); *see also id.* at 177 ("The authors welcome others to contact the UCLA Voting Rights Project with possible additional theories.").

that section 82.003 wholly prevents them from voting. Nor could they. In their complaint, plaintiffs' asserted impediment to voting was the effect of the pandemic. ROA.2463-80. That was insufficient at the time because if plaintiffs had specific concerns about the risk of contracting COVID-19 at a polling place, the Texas Supreme Court made clear that "a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability." *In re State of Texas*, 602 S.W.3d at 560; *see also id.* ("[T]he decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of 'disability.'"). In defending the ripeness of their claims given the changed circumstances since the complaint, however, plaintiffs disclaim even that concern as a ground for an entitlement to relief. Cascino Br. 14.

Fourth, plaintiffs' loose reading of the law-of-the-case doctrine would subsume the rule of orderliness in any case involving multiple appeals. Such a construction of the rule is irreconcilable with the "careful" and "self-imposed" discipline that counsels the Court not to depart from precedent just because a judge may think an earlier decision "wrong, unworkable, or unwise." *Sambrano*, 45 F.4th at 887 (Smith, J., dissenting from the denial of the petition for rehearing en banc). If there is any error or manifest injustice in applying *TDP II* here, it works in plaintiffs' favor because more recent caselaw—which plaintiffs do *not* assert is exempt from these bars against relitigation—would have required the case be dismissed on sovereign immunity grounds.

C. Because the Court is bound by its prior rulings, it need not address most of plaintiffs' jurisdictional arguments.

As explained above, because this Court is bound by either the rule of orderliness or the law of the case doctrine, the Secretary agrees that plaintiffs have both standing and a route around sovereign immunity to sue her. If the Court concludes that it is *not* so bound by *TDP II*, subsequent caselaw suggests that the plaintiffs likely have standing under *OCA Greater Houston v. Texas*, 867 F.3d 605, 613 (5th Cir. 2017), but *cannot* evade sovereign immunity, *Tex. Alliance for Retired Ams. v. Scott*, 28 F.4th 669, 674 (5th Cir. 2022) (*TARA*).[7]

"Federal courts are without jurisdiction over suits against a [S]tate, a state agency, or a state official in his official capacity unless that [S]tate has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). Plaintiffs have long since acknowledged that *Ex parte Young* is their only means of avoiding sovereign immunity with respect to their age-based eligibility claim. ROA.2611. And the *TDP II* Court agreed. 978 F.3d at 178-80. *Ex parte Young*, however, "rests on the premise—less delicately called a fiction—that when a federal court commands a state official to do nothing more than refrain from violating a federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). It is "a narrow exception . . . grounded in traditional equity practice" that does not permit injunctions against government

[7] The Secretary reserves the right to argue that *OCA*'s standing analysis is incorrect either to the en banc court or the Supreme Court.

officials who do not enforce the relevant statute. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 525 (2021).

Absent *TDP II*, plaintiffs' claims would not fit within this narrow exception because they do not allege a "sufficient connection between the defendant state officials and the challenged statute" to invoke *Ex parte Young*. *Okpalobi v. Foster*, 244 F.3d 405, 415 (5th Cir. 2001) (en banc) (plurality). Although "how much of a 'connection' has been hard to pin down," since *TDP II*, this Court has recognized that "some guideposts have emerged." *TARA*, 28 F.4th at 672. To start, the official must have more than "the general duty to see that the laws of the state are implemented." *City of Austin v. Paxton*, 943 F.3d 993, 999–1000 (2019) (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). Instead, the official must have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Morris*, 739 F.3d at 746. This analysis is performed provision-by-provision. *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467–68 (5th Cir. 2020). "Th[at] is especially true here because the Texas Election Code delineates between the authority of the Secretary of State and local officials." *TARA*, 28 F.4th at 672 (treating *TDP II* as law of the Circuit). *Third*, to count as "*enforcement*," whatever power an officer possesses must allow him to exercise "compulsion or constraint" over the named plaintiff. *City of Austin*, 943 F.3d at 1000 (quoting *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010)); *see also TARA*, 28 F.4th at 672.

Plaintiffs' claims fail first and foremost because they impermissibly rely on the Secretary's generalized duties to interpret Texas election law. Even if interpretation constitutes enforcement (which is far from clear), that is not enough under this

Court's precedent: although it would be a "convenient way for obtaining a speedy judicial determination of questions of constitutional law" to allow a plaintiff to sue an official because he *might* enforce state law, *Ex parte Young* recognized that such convenience would be fundamentally at odds with our federal system. 209 U.S. 123, 157 (1908). Preserving the state's and federal government's respective roles within that system is why plaintiffs must show "the particular duty to enforce the statute *in question* and a demonstrated willingness to exercise that duty" *against the plaintiffs*. *Morris*, 739 F.3d at 746 (emphasis added) (adopting *Okpalobi* plurality).[8]

The Secretary cannot constrain plaintiffs—or anyone else—from voting by mail. Instead, under the Election Code, only local early-voting clerks "review each application for a ballot to be voted by mail" and either "provide" a ballot or "reject the application." Tex. Elec. Code § 86.001; *see also Texas*, 2020 WL 2759629, at *10-11 (discussing role of early-voting clerks). And the Secretary cannot compel local officials to review mail-in-ballot applications in any particular way. *In re Stalder*, 540 S.W.3d 215, 218 n.9 (Tex. App.—Hous. [1st Dist.] 2018, no pet.); *Ballas v. Symm*, 351 F. Supp. 876, 888 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974) ("Plaintiff admits that the Secretary's opinions are unenforceable at law and are not binding."). Indeed, it was the Secretary's *inability* to compel clerks to act that

[8] As plaintiffs do not assert that their view of the rule of orderliness or law-of-the-case doctrine revives their claims against the Governor or Attorney General, the Secretary will not burden the Court by repeating them here. They would, however, fail for the reasons the Court previously set out, *TDP II*, 978 F.3d at 180-81, and which those defendants have already described, *e.g.*, ROA.543-44.

necessitated the State's petition for a writ of mandamus in the Texas Supreme Court against five county election officials.

Moreover, even if the Secretary could compel local action, a federal court cannot order her to do so. Any enforcement action by the Secretary would be affirmative action taken in her official capacity. It is well-established in this Circuit that *Ex parte Young* does not extend to "cases where the [defendant] could satisfy the court['s] decree only by [affirmatively] acting in an official capacity"; rather, it applies only where defendants can be ordered *to stop* actions violating federal law. *Zapata v. Smith*, 437 F.2d 1024, 1026 (5th Cir. 1971); *accord Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1211-12 (11th Cir. 2020); *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001).

Plaintiffs have never pointed to any action by the Secretary that could be enjoined via a prohibitory injunction. Instead, they rely on her title as chief election officer and this Court's decision in *OCA-Greater Houston*, 867 F.3d at 613. *E.g.*, ROA.956, ROA.2611 (relying on *TDP II*). That title is, however, not a "delegation of authority to care for any breakdown in the election process." *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972). And, as this Court has subsequently recognized in *TARA*, *OCA-Greater Houston* involved a claim under the Voting Rights Act for which the Court concluded Congress had "validly abrogated state sovereign immunity." 867 F.3d at 614. The Court therefore had no reason to discuss *Ex parte Young*'s exception to sovereign immunity and its decision "has no bearing on the *Ex parte Young* analysis." *TARA*, 28 F.4th at 674. By contrast, absent *TDP II*, this Court's subsequent case law would require this case be dismissed. *E.g.*, *id.* If the Court were

to decide that an exception to the rule of orderliness or the law-of-the-case doctrine applies, it would need to reconsider the sovereign immunity ruling, too.

III. Section 82.003 Comports with the Text and History of the Twenty-Sixth Amendment.

Although there is no occasion to revisit the issue, if the Court does so, it should affirm *TDP II*'s central holding that section 82.003 does not deny or abridge the right to vote—as that term is used in the Constitution—based on age. Section 82.003 does not create any sort of barrier to voting for anyone; it merely permits an additional option to vote by mail for those 65 or older. True, such a law would be subject to the equal-protection analysis imposed by the *Fourteenth* Amendment. Because age is not a suspect class, however, section 82.003 is subject only to rational-basis review. Texas's interests in generally requiring voters to vote in person is more than sufficient to justify the State's statutory scheme.

A. Section 82.003 does not implicate, let alone deny or abridge, the rights of voters younger than 65.

Beginning with the text, as the Court must, the Twenty-Sixth Amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age." U.S. Const. amend. XXVI, § 1. The Amendment does not define the term "right to vote," but it "must be interpreted by reference to historical practices and understandings" at the time of ratification. *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (quotation marks omitted). This includes other times the same term is used in the Constitution and "the effect attributed to them before the amendment was adopted." *Eisner v.*

Macomber, 252 U.S. 189, 205 (1920); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 18 (1916); *accord Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1968-69 (2020) (applying the Suspension Clause as understood by courts at the time of ratification).

Applying this analysis to the Twenty-Sixth Amendment, the threshold question is what the "right to vote" meant in 1971. *TDP II*, 978 F.3d at 188. Most notably, the "right to vote" was *not* understood to include a right to vote by mail. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969).[9] Instead, the right to vote itself is implicated only when the challenged law—either alone or in combination with other laws—leaves a voter entirely unable to cast a ballot. *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974); *Goosby v. Osser*, 409 U.S. 512, 521-22 (1973); *accord Am. Party of Tex. v. White*, 415 U.S. 767, 795 (1974) (remanding for determination of whether State arbitrarily denied "alternative means to vote"). It does not entitle any voter to a mail-in ballot, so a law that limits the availability of mail-in ballots based on age does not "abridge[]" the right protected by the Twenty-Sixth Amendment. *Cf. Hubert v. Lando*, 441 U.S. 153, 158 (1979).

[9] *McDonald* remains good law. Though plaintiffs doubt its continuing vitality, Cascino Br. 25-26, the Supreme Court cited it with approval in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), one of the two cases establishing the modern test for when a law abridges the right to vote. *See also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring) (noting that the ability to cast "absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required").

The Amendment's history confirms that it reflected an effort to extend the right to vote as it was then understood to individuals between the ages of 18 and 21—not, as plaintiffs suggest, to eliminate all age-based distinctions in any election-related regulations. Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1184-95 (2012). Moreover, that history reflects that mail-in voting was to be *avoided* because the "special burdens" that it imposes on voters "might well serve to dissuade" young people from voting. S. Rep. No. 92-26 at 14 (1971).

The limited effect of the Amendment has also been recognized in the state and federal district court cases that addressed it before this Court and the Seventh Circuit did. For example, in *Meyers v. Roberts*, the Supreme Court of Minnesota held that the Twenty-Sixth Amendment "on its face applies only to the right to vote" and says nothing about related rights, such as the right to hold office. 246 N.W.2d 186, 189 (Minn. 1976); *see also Spencer v. Bd. of Educ. of Schenectady*, 291 N.E.2d 585, 585 (N.Y. 1972). And a federal district court in *Nashville Student Organizing Committee v. Hargett* rejected a challenge to a voter identification law because even if younger voters were less likely to have an acceptable form of ID, the law "is not an abridgement of the right to vote." 155 F. Supp. 3d 749, 757 (M.D. Tenn. 2015). As that court explained, "the handful of cases" finding a violation of the Twenty-Sixth Amendment have involved state action "that actually blocked young people from voting rather than simply exclud[ing] measures that would make it easier for them to do so." *Id.* at 757-58.

Plaintiffs suggest (at 17) that adopting this view would allow a State to determine who might vote by mail based on race, gender, or wealth in violation of the Fifteenth,

Nineteenth, and Twenty-Fourth Amendments. This argument fails to take into account the Fourteenth Amendment, which raises the level of scrutiny applied to all regulations based on suspect classifications, regardless of whether they implicate the right to vote. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 216 & n.14 (1982). Age, however, is not a suspect classification. *E.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000). Indeed, that age restrictions are subject to rational-basis review under the Fourteenth Amendment while "hypothetical laws similarly restricting the ability of African Americans or women or the poor to vote by mail" would be subject to heightened scrutiny was a significant factor in the Seventh Circuit's rejection of a nearly identical challenge to the one presented here. *Tully*, 977 F.3d at 614. Plaintiffs do not cite *Tully*, let alone distinguish it or explain why this Court—which is "always chary to create a circuit split"—should depart from its reasoning. *Gahagan v. U.S.C.I.S.*, 911 F.3d 298, 304 (5th Cir. 2018) (quoting *United States v. Graves*, 908 F.3d 137, 142 (5th Cir. 2018) (quotation omitted)).[10]

Furthermore, plaintiffs are also incorrect that laws like section 82.003 abridge the right to vote because they do not provide the same options to all voters to cast their vote. To "vote" is the "expression of one's preference or opinion . . . by ballot, show of hands, or other type of communication." Black's Law Dictionary 1807 (10th

[10] Plaintiffs do rely (at 19) upon a *different* Seventh Circuit case for the unremarkable proposition that abridgments of the right to vote must be treated the same under the Twenty-Sixth Amendment as under the Fifteenth. *Luft v. Evers*, 963 F.3d 665, 673 (7th Cir. 2020). But, as *Tully* noted, *Luft* also recognized that "[o]ne less-convenient feature does not an unconstitutional system make." 977 F.3d at 618 (quoting *Luft*, 963 F.3d at 675).

ed. 2014); *accord* Black's Law Dictionary 274, 1748 (4th ed. 1957). The right to vote does not guarantee the right to vote "in any manner" the voter might prefer. *Burdick*, 504 U.S. at 433. Since before the Twenty-Sixth Amendment, the term "abridge" has meant "[t]o reduce or contract." Black's Law Dictionary 21 (4th ed. 1957). Similarly, "abridgment" in this context has not been understood to refer to "options" for voting—that is, the manner by which people vote. Instead, that term has most often been understood to include practices like cracking and packing of racial blocs, which do not eliminate the right to vote but do dilute the value of certain votes. *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986); *see also, e.g.*, *Luft*, 963 F.3d at 672-73.

The *TDP II* Court therefore correctly held that section 82.003 does not abridge the right to vote because it does not "place a barrier or prerequisite to voting" for individuals under 65 that would not otherwise exist. 978 F.3d at 191. The Court's discussion was consistent with Supreme Court precedent, which has distinguished "a statute which ma[kes] casting a ballot easier for some who were unable to come to the polls" from a "statute absolutely prohibit[ing]" someone else "from exercising the franchise." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969). Ordinary procedural rules may make voting more or less convenient for certain groups of voters depending on the circumstances, but minor inconvenience does not "abridge" the right to vote. *Crawford*, 553 U.S. at 198 (plurality op.). And a procedural rule "abridge[s]" the right to vote only if it "erects a real obstacle" to the individual's right to cast a ballot. *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965) (applying *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Even assuming section 82.003 implicates the right to vote (and it does not, *supra* pp. 24-25; *Tully*, 977 F.3d at 613),

it does not abridge that right because it does not erect an obstacle to anyone trying to cast a ballot.

B. Section 82.003 is rationally related to legitimate government interests.

In *TDP II*, the Court declined to state what level of scrutiny applies in Twenty-Sixth Amendment challenges given its holding that section 82.003 does not deny or abridge the right to vote. If the Court concludes it is necessary to decide this issue, then the Court should find that section 82.003 is subject to rational-basis review, not strict scrutiny. *Contra* Cascino Br. 26-29.

It is black-letter law that not every election-related piece of legislation is subject to strict scrutiny. Because "[e]very decision that a State makes in regulating an election will, inevitably, result in somewhat more inconvenience for some voters than for others," the Supreme Court has developed a balancing test for claims related to the franchise. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016). Under this standard, the Court must first identify the relevant state action, and then "weigh 'the character and magnitude of the asserted injury'" to plaintiffs' constitutionally protected right "against 'the precise interests put forward by the State as justifications for the burden imposed.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). State actions that impose a "severe" burden on the right to vote are closely scrutinized. *Id.* "Lesser burdens, however, trigger less exacting review." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). As discussed above, section 82.003 does not implicate the right to vote—let alone

impose a severe burden upon it. *Supra* Part III.A. As a result, Texas's mail-in-ballot rules do not implicate the right to vote and are subject only to rational-basis review.

Texas's decision to facilitate voting by those over 65, which is common among the States, is "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). "[R]ational basis review . . . is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319 (1993) (internal quotation marks omitted). Moreover, the burden is not on Texas to prove the law valid but "on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012). Plaintiffs have not met this burden.

The Election Code's distinction between voters aged under and over 65 is rational. Even outside the context of COVID-19, individuals over 65 (as a group) face greater challenges in attending the polls. For example, many reside in nursing homes and have limited mobility.[11] Though others may also have difficulties reaching the polls, the line drawn by a State need not be "perfectly tailored to that end," so long as the distinction is not arbitrary. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). Texas's Legislature may "take one step at a time, addressing itself to the phase of the problem which seems most acute." *F.C.C. v. Beach Commc'ns Inc.*, 508 U.S. 307, 316 (1993); *see also Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003).

[11] *See* Tex. Health and Human Servs., *Long Term Care*, https://tinyurl.com/4jehmdv3.

Texas's conclusion that the problems facing older voters are unique is not a new one. Many States allow citizens to vote by mail, but it is "common" for States that limit vote-by-mail to certain citizens "to provide this option to older voters."[12] Every State in this Circuit does so,[13] and many others do, too.[14] Even States that do not determine eligibility based on age have made it easier for older voters to obtain mail-in ballots—*e.g.*, by allowing them to permanently register for mail-in ballots, rather than requiring periodic re-enrollment.[15] Indeed, Congress requires States to assist older voters in obtaining mail-in ballots as part of a national policy "to promote the fundamental right to vote by improving access for handicapped and elderly individuals." 52 U.S.C. §§ 20101, 20104(a), (c).

These statutes are not new. Texas, for example, amended its 1975 law to allow those over 65 to vote by mail in the *same bill* that extended the right to vote to those from 18 to 21. *Supra* pp. 3-4. That this law was passed immediately after the Twenty-Sixth Amendment is strong evidence that the law was understood to be consistent with the Constitution. *See Town of Greece*, 572 U.S. at 576; *Atwater v. Lago Vista*, 532

[12] Nat'l Conf. of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options* (July 12, 2022), https://tinyurl.com/mrxd78ku.

[13] Tex. Elec. Code § 82.003; La. Stat. § 18:1303(J); Miss. Code § 23-15-715(b).

[14] *E.g.*, Ind. Code § 3-11-10-24(a)(5); Ky. Rev. Stat § 117.085(1)(h)(8); Tenn. Code § 2-6-201(5)(A).

[15] *E.g.*, Ga. Code § 21-2-381(a)(1); Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 Elder L.J. 453, 471-76 nn. 144-45, 183 (2006) (collecting laws facilitating voting among the elderly).

U.S. 318, 337-40 (2001); *cf. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv. LLC*, 140 S. Ct. 1649, 1659-60 (2020).

To that end, section 82.003 is not just rational; it also advances significant state interests. Texas has a compelling and undisputed need to prevent voter fraud. The Supreme Court has acknowledged that the threat of such fraud is "real," *Crawford*, 553 U.S. at 195-96 (plurality op.), and "could affect the outcome of a close election," *id.* (plurality op.). And this Court has recognized that this concern is particularly pressing for mail-in ballots. *Veasey*, 830 F.3d at 239; *cf. Crawford*, 553 U.S. at 225 (Souter, J., dissenting) ("absentee-ballot fraud . . . is a documented problem"). Plaintiffs fault the State (at 28-29) for failing to put forward sufficient evidence of fraud, but such evidence "has never been required to justify a state's prophylactic measures to decrease occasions for vote fraud or to increase the uniformity and predictability of election administration." *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 147 (5th Cir. 2020). Indeed, the Supreme Court has advised that "[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).

Moreover, apart from the risk of fraud, mail-in voting is a "complex procedure" in Texas, with unique logistical challenges that cannot be addressed "at the last minute." *Veasey*, 830 F.3d at 255. These challenges take many forms, but consider just one: printing ballots for the numerous elections that Texas has in any given year. Because Texas is a diverse State where many languages are spoken, ballots either need to be printed in multiple languages or assistance needs to be provided in a way

that the nominal helper does not impose his own views on the voter, Tex. Elec. Code ch. 64, sub. ch. B.

These logistical issues are pervasive. They include not just printing, but also creating adequate safeguards to ensure that ballots are sent to the correct address, and that they are actually completed by the registered voter, *Id.* ch. 87. Failure to adequately address any of these issues could "drive[] honest citizens out of the democratic process and breed[] distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Limiting mail-in ballots to those who likely need—as opposed to want—them is entirely rational because it limits that possibility to where the risks and costs associated with mail-in ballots are most justified.

For very similar reasons, section 82.003 would survive even more stringent judicial evaluation. *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789. As discussed above, *supra* Part III.A., section 82.003 does not implicate or abridge plaintiffs' right to vote at all. By contrast, the State has a "compelling interest in preserving the integrity of its election process" that justifies section 82.003 under any level of scrutiny to which it could be subjected. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *supra* pp. 30-33.

Conclusion

The Court should affirm the district court's dismissal of plaintiffs' Twenty-Sixth Amendment claim under Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted.

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Certificate of Service

On January 18, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,613 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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